

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

STEVEN MCDERMOTT and
STACEY MCDERMOTT
Plaintiffs,

v.

DOCKET NO: 04-CV-12253

FEDEX GROUND PACKAGE SYSTEMS,
INC., T.S. PRUITT, ALLEGIANCE
HEALTHCARE, INC., D. PONCE, E.W.
WYLIE CORPORATION, D.W. SMITH,
ARSENBERGER TRUCKING, INC., J.T.
FOSBRINK, RYDER TRUCK RENTAL,
LORRAINE ODZANA as
ADMINISTRATRIX OF THE ESTATE OF
JAMES J. ODZANA, SHORELINE
TRANSPORTATION, INC., JACLYN
PALETTA as ADMINISTRATRIX OF
THE ESTATE OF MARIO J. CASTRO
Defendants.

MEMORANDUM OF DEFENDANT, J.T. FOSBRINK, IN
SUPPORT OF HIS MOTION FOR ENTRY OF SEPARATE AND FINAL JUDGMENT

The defendant, J.T. Fosbrink ('Fosbrink'), hereby moves pursuant to Fed. R. Civ. P. 54(b) for entry of separate and final judgment in his favor as to all claims asserted against him.

FACTUAL BACKGROUND

This case involves multiple defendants. The plaintiffs filed a Complaint against FedEx Ground Package Systems and T.S. Pruitt on October 26, 2004. The plaintiffs then filed a Second Amended Complaint on December 22, 2006, adding ten defendants, including Fosbrink. On July 27, 2007, Fosbrink filed a motion to dismiss on the grounds of a lack of personal jurisdiction. On September 13, 2007, after a full hearing, the court allowed Fosbrink's motion to dismiss.

Pursuant to Rule 54(b), the Court may direct entry of separate and final judgment as to one or more claims or parties upon an express determination that there is no just reason for delay. As there are no pending claims against him, Fosbrink should not be forced to incur the hardship of remaining a party while litigation continues between the remaining parties. Furthermore, there is no just reason for delay and the parties will not be prejudiced by the entry of separate and final judgment.

ARGUMENT

I. There is no reason for delay and this Court should enter separate and final judgment in favor of J.T. Fosbrink.

The Federal Rules of Civil Procedure Rule 54(b) regarding judgment upon multiple claims or involving multiple parties states that:

“When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third party claim, or when multiple parties are involved, the Court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.”

The plaintiffs’ opposition to Fosbrink’s motion to dismiss for lack of personal jurisdiction was based solely on the fact that Fosbrink did not assert a specific affirmative defense setting forth the defense of lack of personal jurisdiction. The plaintiffs did not oppose the lack of jurisdiction issue on the merits. The Court was persuaded that Fosbrink’s general denial of any jurisdictional claims satisfied the tests set forth by prior courts and found that Fosbrink had acted reasonably and promptly in moving to dismiss and therefore granted the motion.

In the present case, the Plaintiffs do not have a claim against Fosbrink because this court has no jurisdiction over Fosbrink. Further, there is no evidence to suggest that there will be any risk of prejudice from immediate appellate review.

Fosbrink therefore requests that an order of separate and final judgment as to all claims be entered in his favor.

CONCLUSION

WHEREFORE, the defendant, J.T. Fosbrink, requests that this Court make an express determination that there is no just reason for delay and enter separate and final judgment in Fosbrink's favor, pursuant to Fed. R. Civ. P. 54(b), with respect to all claims against Fosbrink.

Respectfully submitted,

The Defendant,
J.T. FOSBRINK,
By his Attorneys,

/s/Cheryl A. Enright

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CERTIFICATE OF SERVICE

I hereby certify that is document filed through the EFC system will be sent electronically to the registered participants as identified in the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on this 25th day of October, 2007.

/s/Cheryl A. Enright

Cheryl A. Enright, BBO No. 552237